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In the Supreme Court of the United States

OCTOBER TERM, 1959

EDWIN J. SORKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Lawn v. *United States*, 355 U.S. 339	4
Michelson v. *United States*, 335 U.S. 469	5
Williams v. *United States*, 168 U.S. 382	4

Statute:

18 U.S.C. 1001	2, 3

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OPINION BELOW

The opinion of the court of appeals (R. 17-20; Pet. 13-15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1960 (R. 21). The petition for a writ of certiorari was filed April 8, 1960. The jurisdiction of this Court may be invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established that petitioner made a false statement within the purview of 18 U.S.C. 1001.

2. Whether the court properly struck the testimony of a character witness on the ground that no proper foundation for the testimony was laid.

3. Whether a question to a character witness as to whether he had heard certain rumors constituted error in a non-jury case where the question was never answered.

4. Whether certain evidence offered by petitioner was properly excluded.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

The facts are taken from the Court of Appeals opinion except where noted.[1]

Petitioner and his employer were indicted in two

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[1] Petitioner's citation to record references (Pet. 4) are to the transcript and not to the record filed in this Court. We have lodged the certified transcript with the Clerk of this Court.

counts. Count I charged a false statement under 18 U.S.C. 1001 in that they falsely described the type of electron tube exported, and Count II charged them with exporting an electron tube, type 6326, valued at $440 without a validated export license (R. 3-4). After a non-jury trial they were found guilty on both counts and petitioner was sentenced to 60 days imprisonment on each count, the sentences to run concurrently (R. 2). The Court of Appeals affirmed the convictions *per curiam*.

Evidence at the trial indicated that any electron tube which had a value of under $50 could be exported without license (R. 9). A tube over that amount needed a validated export license. If the tube here involved had been accurately described it could not have been exported without a license. By falsifying the type and value of the tube, it was made to appear that the tube could be exported without the necessary license.

ARGUMENT

1. Petitioner seeks to raise a question, on which there has been some disagreement among the courts of appeals, as to whether, in a prosecution under 18 U.S.C. 1001 for making a false statement in a matter within the jurisdiction of an agency of the United States, the false statement must be shown to be material. That issue is not presented by this record.

The evidence in this case demonstrated that the false statement was in fact material. The Court of Appeals noted (R. 19):

> The proof amply demonstrates that had an accurate statement been made the validated export license, necessary for export, would have been denied. The falsification of the type and value of the electron tube described in the statement made it appear that a validated export license was not necessary and, therefore, permitted to be exported an article that but for the false statement, could not have been exported.

The Court of Appeals concluded, "[W]e find it hard to imagine a statement more clearly material" (R. 19).

Moreover, petitioner received concurrent sentences on both Counts I and II. He does not here challenge the evidence on Count II, which showed that he unlawfully exported an electron tube without having the necessary validated license. Therefore, the 60-day sentence is fully supported by Count II, and there is no occasion to review the contentions relating solely to Count I. *Lawn* v. *United States*, 355 U.S. 339, 359, 362.

2. Petitioner contends that it was error to strike the testimony of a character witness who testified to knowing petitioner's reputation "in the business area in which he [was] employed" (R. 12). On cross-examination, the witness said he never discussed petitioner with anyone other than company personnel (R. 13). The court properly ruled that this was an insufficient basis for receiving character evidence. Character evidence has long been restricted to "general reputation in the community in which he resided, as distinguished from his reputation among a few persons in a particular building." *Williams* v. *United States*, 168 U.S. 382, 397. The question asked on cross-

examination—whether the witness discussed the accused with others—is a traditionally accepted question. See *Michelson* v. *United States*, 335 U.S. 469, 472. Petitioner claims the basis of the evidence is what a witness "has heard" (Pet. 9), but the short answer is that here the character witness was never asked what he had "heard." As the court below noted, since the necessary foundation had not been laid, "we must assume it could not have been laid for otherwise additional questions could have been put to the witness, and this was not done" (R. 19).

3. Petitioner claims that it was reversible error to ask a character witness about a rumor that the petitioner "had engaged or had possibly engaged in a smuggling operation" (R. 10). Since this was neither pressed nor answered, it forms no basis for complaint, particularly in a non-jury trial. In any event, the question was proper. A character witness "may be required to disclose rumors". *Michelson* v. *United States*, *supra*, 335 U.S. at 479. Petitioner's citations (Pet. 11) are inapposite. While "evidence of other crimes is not generally admissible", the cases cited refer to such evidence as part of the prosecution's affirmative case. Once the petitioner has voluntarily opened his reputation by use of character witnesses, evidence of other crimes, rumors, or reports provide a recognized basis to test the foundation of the testimony offered by the character witness. *Michelson* v. *United States*, *supra*, at 479.

4. Petitioner contends that it was error to exclude testimony by petitioner as to the number of visits government agents had made to his place of business,

arguing that this bears on petitioner's intent (Pet. 12). It is unexplained how the number of visits by an agent can bear upon intent formed by petitioner to commit or not commit a crime. In any event, this information was previously elecited directly from the agent (Tr. 19-20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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